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HEALTH, LLC and EVOLVHEALTH
MEXICO SERVICIOS, S. de R.L. de C.V.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

EVOLV HEALTH, LLC and
EVOLVHEALTH MEXICO
SERVICIOS, S. de R.L. de C.V.,

Plaintiffs,

vs.

COSWAY USA, INC., d/b/a
ECOSWAY USA, INC., GLEN
JENSEN, JEFFREY N. ALDOUS and
VINCENT TAN,

Defendants.

CASE NO. 2:16-cv-01602-ODW (ASx)

**NOTICE OF MOTION AND
MOTION TO WITHDRAW AS
COUNSEL FOR PLAINTIFFS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date; May 1, 2017
Time: 1:30 p.m.
Place: Courtroom 11
312 N. Spring Street
Los Angeles, CA 90012

Hon. Otis D. Wright II
Courtroom: 11

Pre-trial Date: August 7, 2017
Trial Date: August 29, 2017

TO PLAINTIFFS EVOLV HEALTH, LLC, AND EVOLVHEALTH
MEXICO SERVICIOS, S. de R.L. de C.V., AND TO DEFENDANTS AND THEIR
ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, May 1, 2017, at 1:30 p.m., in
Courtroom 11 of the United States Courthouse located at 312 North Spring Street,
Los Angeles, California 90012, Craig Holden, Adrianna Kourafas and Lewis
Brisbois Bisgaard & Smith LLP (collectively, "LBBS") will and hereby do move for
leave to withdraw as counsel for Plaintiffs Evolv Health, LLC, and EvolvHealth

1 Mexico Servicios, S. de R.L. de C.V.

2 LBBS moves for leave to withdraw as counsel for Plaintiffs Evolv Health,
3 LLC, and EvolvHealth Mexico Servicios, S. de R.L. de C.V. (collectively
4 “Plaintiffs”), pursuant to Rule 7 of the Federal Rules of Civil Procedure and Local
5 Rule 83-2.3.2.

6 Good cause exists for the withdrawal of counsel because: (1) lead counsel, J.
7 Robert Arnett II (“Mr. Arnett”) and Carter Scholer PLLC (“Carter”), are seeking to
8 withdraw in the absence of substitute lead counsel in a case involving a more than 4-
9 year litigation history with a prior Texas action with which LBBS was not involved
10 and about which LBBS does not have the requisite knowledge of the evidence to
11 prosecute this action as LBBS has only served a limited role solely as local counsel;
12 (2) Plaintiffs have refused to provide LBBS with a retainer it has requested and that
13 is necessary for LBBS to serve in the lead counsel role and Plaintiffs have failed to
14 comply with LBBS’s fee agreement by paying the additional retainer LBBS
15 demanded for it to take over as lead counsel in this litigation, which will be a time-
16 consuming and costly endeavor; and, (3) to the extent Plaintiffs have disregarded
17 their obligations to pay Mr. Arnett and Carter, LBBS is concerned Plaintiffs may
18 also disregard its payment obligations to LBBS.

19 This motion to withdraw is made in compliance with the local rules. The
20 withdrawal of counsel is not sought for delay but so that justice may be done.

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1 WHEREFORE, LBBS respectfully requests that this Court grant its motion
2 and order that it be withdrawn as counsel for Plaintiffs and discharged from all
3 further responsibility to Plaintiffs in this matter.

4 DATED: April 3, 2017

LEWIS BRISBOIS BISGAARD & SMITH LLP

6 By: /s/ Craig Holden

7 Craig Holden

8 Adrianna Kourafas

9 Attorneys for Plaintiffs EVOLV HEALTH,
10 LLC and EVOLVHEALTH MEXICO
11 SERVICIOS, S. de R.L. de C.V.
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MEMORANDUM OF POINTS AND AUTHORITIES

Craig Holden, Adrianna Kourafas, and Lewis Brisbois Bisgaard & Smith LLP (collectively, “LBBS”) move for leave to withdraw as counsel for Plaintiffs Evolv Health, LLC, and EvolvHealth Mexico Servicios, S. de R.L. de C.V. (collectively “Plaintiffs”), pursuant to Rule 7 of the Federal Rules of Civil Procedure and Local Rule 83-2.3.2.

Good cause exists for the withdrawal of counsel because: (1) lead counsel, J. Robert Arnett II (“Mr. Arnett”) and Carter Scholer PLLC (“Carter”), are seeking to withdraw in the absence of substitute lead counsel in a case involving a more than 4-year litigation history with a prior Texas action with which LBBS was not involved and about which LBBS does not have the requisite knowledge of the evidence to prosecute this action as LBBS has only served a limited role solely as local counsel; (2) Plaintiffs have refused to provide LBBS with a retainer it has requested and that is necessary for LBBS to serve in the lead counsel role and Plaintiffs have failed to comply with LBBS’s fee agreement by paying the additional retainer LBBS demanded for it to take over as lead counsel in this litigation, which will be a time-consuming and costly endeavor; and, (3) to the extent Plaintiffs have disregarded their obligations to pay Mr. Arnett and Carter, LBBS is concerned Plaintiffs may also disregard its payment obligations to LBBS.

In light of the foregoing, LBBS respectfully requests that this Court grant its motion for leave to withdraw and order that it be withdrawn as counsel for Plaintiffs and be discharged from all further responsibility to Plaintiffs in this matter.

I. FACTUAL BACKGROUND

Mr. Arnett had been representing Plaintiffs in a related action that he and his firm commenced on November 13, 2013—about three and a half years prior to Mr. Arnett’s initial contact with Mr. Holden—against EpicEra Incorporated, eCosway USA, Inc., Glen Jensen, and Jeffrey N. Aldous in the 68th Judicial District Court of Dallas County, Texas (the “Texas Action”). Holden Decl., ¶2. Attorney Michael

1 Gaubert was Mr. Holden's partner at the time, and asked Mr. Arnett to contact Mr.
 2 Holden, following a venue dispute in the Texas Action that required that Mr. Arnett
 3 dismiss a portion of the Texas Action and re-file it in California. Id. Mr. Arnett
 4 asked Mr. Holden to help him obtain pro hac vice status for the present action, and
 5 indicated that the Texas Court dismissed certain claims against eCosway, Jensen,
 6 and Aldous and directed that all such claims against these parties be brought in
 7 California. Id. Mr. Arnett indicated he would be serving as lead counsel. Id.

8 Mr. Arnett drafted the complaint commencing this action, which, per Mr.
 9 Arnett's request, Mr. Holden filed for him on March 10, 2016. Id., ¶3. Neither Mr.
 10 Holden nor his LBBS colleagues were involved in drafting the complaint. Id.

11 On April 1, 2016, Mr. Holden filed an application for Mr. Arnett to appear
 12 pro hac vice as counsel for Plaintiffs in this action, and this Court granted the
 13 application. Id., ¶4. Mr. Arnett and Plaintiffs confirmed to LBBS that Carter
 14 Scholer would serve as lead counsel given its historical knowledge of the Texas
 15 Action (which led to this action) and that LBBS would be expected to serve as local
 16 counsel. Id.

17 Without any advance warning to LBBS, Mr. Arnett and Carter Scholer filed a
 18 motion to withdraw as counsel on March 16, 2017. Id., ¶5. Their motion was
 19 largely based on Plaintiffs purported failure to timely pay all invoices, bills, and
 20 other such obligations. Holden Decl., ¶15. Plaintiffs filed an opposition on March
 21 27, 2017 along with supporting declarations. Holden Decl., ¶5. One such supporting
 22 declaration was the declaration of Craig Holden, which not only opposed Mr.
 23 Arnett's and Carter Scholer's request for withdrawal but also provided written
 24 notice of LBBS's intent to file this motion to withdraw. Id.

25 Mr. Arnett and Carter Scholer have served as lead counsel in the related
 26 Texas Action that has been heavily litigated for over three years (with numerous
 27 motions and depositions), and of the named counsel in this action, exclusively have
 28 the knowledge of the evidence from the Texas Action (which LBBS never appeared

1 in) needed to prosecute the current case scheduled for trial this August, and LBBS
 2 does not presently have this knowledge. Id., ¶6. It would be too costly for Plaintiffs
 3 to pay LBBS substantial sums for LBBS to learn what Carter Scholer already knows
 4 about the Texas Action. Id.

5 Even LBBS's involvement with local procedure inquiries has been extremely
 6 limited. Holden Decl., ¶7. In fact, to date, LBBS has billed a very small amount of
 7 fees (approximately \$15,000) to Plaintiffs as local counsel since Mr. Arnett and his
 8 firm have performed all of the substantive and even most procedural work, to date.
 9 Id. Given LBBS's limited involvement in the case to date and lack of knowledge of
 10 the evidence from the Texas Action, it would be of little consequence to Plaintiffs if
 11 LBBS withdrew. In fact, it would likely cost roughly the same for substitute
 12 counsel to review and digest the extensive history of litigation in the Texas Action
 13 as it would for LBBS to do so. Id.

14 While LBBS understands the basics of the case, the parties to this action
 15 agreed in July 2016 that documents produced in the Texas Action would be deemed
 16 produced in this action, as is reflected in the joint report filed on July 18, 2016.
 17 Holden Decl., ¶8. In short, the discovery from the Texas Action will be relied upon
 18 in this action. Id. This action is part and parcel of the Texas Action that now has 4.5
 19 year litigation history for which LBBS does not have the details associated with the
 20 supporting evidence. Id. This information resides with Mr. Arnett and his firm.

21 Since the filing of this action, it was known and agreed upon that Mr. Arnett
 22 and his firm would be leading it. Holden Decl., ¶9. If they are permitted to
 23 withdraw, there will be a dramatic change in the relationship with Plaintiffs, which
 24 LBBS cannot take on under the present circumstances. Id. Plaintiffs have refused to
 25 provide LBBS with a retainer that would enable LBBS to take on the lead counsel
 26 role, and LBBS is not in a position to continue without such a retainer. Id. Mr.
 27 Holden has spoken with Mr. Arnett and Plaintiffs to notify them that if Carter
 28 Scholer withdraws, LBBS would also be forced to withdraw since it would no

1 longer be serving as local counsel as everyone anticipated. Id. In contrast, Carter
 2 Scholer is a contingency fee based counsel and their withdrawal would result in the
 3 Plaintiffs having to suddenly account for paying an hourly fee firm for what was
 4 intended to be a contingency fee case, with limited involvement of hourly fee
 5 counsel. Id. Nor have Plaintiffs agreed to pay LBBS a financial retainer necessary
 6 to serve as lead counsel, and nor does Mr. Holden expect they will be able to given
 7 their intent to rely upon contingency counsel. Id. Pursuant to LBBS's current
 8 retainer agreement, it is therefore necessary that LBBS also withdraw as counsel if
 9 Mr. Arnett and his firm are permitted to do so. Id., ¶9, Exhibit 1. This retainer
 10 agreement, Section 8 and 11 (subsections 4-6), provides that the client agrees LBBS
 11 may demand a retainer if there is a change in circumstances, and/or withdraw if
 12 there is a financial burden on the law firm to continue with the case or other good
 13 cause. Id.

14 During a telephone conference with the client on March 27, 2017, I asked the
 15 client for a \$50,000 retainer for LBBS to remain in this action. Id., ¶10. Plaintiffs
 16 have not agreed. Id. The call on March 27 also highlighted a conflict/adversarial
 17 relationship with Plaintiffs regarding the fee arrangement. Id. Specifically, it was
 18 discussed during the call that LBBS would need a substantial financial retainer to
 19 take on the role of lead counsel in this case otherwise (and in the event Mr. Arnett
 20 and Carter Scholer are withdrawn as counsel) LBBS will have no choice but to also
 21 file a motion to withdraw as counsel. Id. Plaintiffs have not agreed to the retainer
 22 required by LBBS and continue to instead request that Mr. Arnett remain in the
 23 case. Id. As such, in the event Mr. Arnett and Carter Scholer are withdrawn as
 24 counsel, LBBS should also be permitted to withdraw as counsel. Id.

25 Mr. Holden had a telephone conference about LBBS's motion to withdraw on
 26 March 31, 2017 with Michael Gaubert and Larry Friedman from Friedman &
 27 Feiger—a firm where Mr. Gaubert previously worked and that assisted Mr. Arnett in
 28 prosecuting the Texas Action. Id., ¶11. Mr. Holden discussed with these men lead

1 counsel representation in the event Mr. Arnett's and Carter Scholer's motion to
 2 withdraw is granted. Id. During the call, Mr. Friedman refused to commit to taking
 3 over the lead counsel role in this action, despite his firms' involvement in the Texas
 4 Action and more extensive knowledge-base for the prosecution of this action. Id.
 5 Also during this call, it was confirmed that no arrangements have been made for
 6 another firm to appear in this action. Id. During this teleconference, Mr. Holden
 7 reiterated that LBBS would be filing a motion to withdraw as counsel. Id.

8 Notably, LBBS only learned of Mr. Arnett's and Carter Scholer's intent to
 9 withdraw in March 2017, and not long after LBBS became aware of this intent,
 10 LBBS instructed Plaintiffs to seek alternate lead counsel, even suggesting on
 11 multiple occasions that Friedman & Feiger would be (the most) appropriate for the
 12 lead counsel role given said firm's knowledge of the relevant litigation history. Id.,
 13 ¶12. Plaintiffs have not obtained alternate counsel, and during the teleconference
 14 with Larry Friedman from Friedman & Feiger on March 31, Mr. Friedman refused
 15 to commit to taking over the lead counsel role in this action, despite his firms'
 16 involvement in the Texas Action and more extensive knowledge-base for the
 17 prosecution of this action. Id. Plaintiffs have been provided with more than ample
 18 opportunity to arrange for substitute counsel but have not made such arrangements.
 19 Id.

20 LBBS has yet to receive a response to its prior demand for an increased
 21 retainer in order to remain in the action. Id., ¶13.

22 Moreover, beyond the fee arrangement issue, due to LBBS's limited
 23 involvement in the case to date, in order to represent Plaintiffs as lead counsel,
 24 LBBS would need to review and digest over four years' worth of litigation history
 25 between the Texas Action and this action, which would take significant time at
 26 significant cost to Plaintiffs and I have notified Evolv's CEO that this would cost at
 27 least \$250,000. Id., ¶14. If LBBS was substituted as lead counsel, the time and
 28 expense of getting caught up to speed on four-plus years of litigation with

1 significant discovery would pose an issue for Plaintiffs. Id.

2 In light of the foregoing, LBBS respectfully requests that this Court grant its
3 motion for leave to withdraw and order that they be withdrawn as counsel for
4 Plaintiffs and be discharged from all further responsibility to Plaintiffs in this
5 matter. Id., ¶16.

6 **II. ARGUMENT**

7 Counsel may withdraw when the client, by its conduct, renders it
8 unreasonably difficult for the member to carry out the employment effectively. Cal.
9 Rules of Prof'l Conduct, Rule 3-700(C)(1)(d). Counsel may also withdraw when it
10 in good faith believes that the court will find good cause for withdrawal. Cal. Rules
11 of Prof'l Conduct, Rule 3-700(C)(6). Moreover, a lawyer may withdraw from
12 representation of a client when (1) withdrawal can be accomplished without material
13 adverse effect on the interests of the client; (6) the representation will result in an
14 unreasonable financial burden on the lawyer or has been rendered unreasonably
15 difficult by the client; or (7) other good cause for withdrawal exists. ABA Rules of
16 Prof'l Conduct, Rule 1.16(b)(1), (6), (7). Counsel may withdraw when Plaintiffs are
17 not burdened by the withdrawal. See *Brown & Bain, P.A. v. O'Quinn*, 518 F.3d
18 1037, 1042 (9th Cir. 2008). When good cause is shown and the ends of justice so
19 require, substitution or relief of attorneys will be allowed even where it will cause
20 delay in prosecution of the action. CD CA Rule 83-2.3.5.

21 Good cause exists for LBBS's withdrawal because LBBS has only
22 represented Plaintiffs in this action as local counsel for the purpose of assisting with
23 local procedure, which LBBS has done to a limited extent. Holden Decl., ¶¶4, 7.
24 Indeed, LBBS has billed a very small amount of fees to Plaintiffs as local counsel
25 since Mr. Arnett and his firm have performed all of the substantive and even most
26 procedural work, to date. Id., ¶7. LBBS does not presently have the knowledge that
27 Mr. Arnett and Carter Scholer obtained while serving as lead counsel in the related
28 Texas Action that has been heavily litigated for over three years (with numerous

1 motions and depositions); Mr. Arnett and Carter Scholer exclusively have the
 2 knowledge as named counsel of the evidence from the Texas Action (which LBBS
 3 never appeared in) needed to prosecute the current case scheduled for trial this
 4 August. Id., ¶6. Moreover, due to LBBS's limited involvement in the case to date,
 5 in order to represent Plaintiffs as lead counsel, LBBS would need to review and
 6 digest over four years' worth of litigation history between the Texas Action and this
 7 action, which would take significant time at significant cost to Plaintiffs. Id., ¶14. If
 8 LBBS were substituted as lead counsel, the time and expense of getting caught up to
 9 speed on four-plus years of litigation with significant discovery would pose an issue
 10 for Plaintiffs. Id. Even more problematic is the fact that Plaintiffs have failed to
 11 provide the substantial retainer that LBBS demanded in return for any representation
 12 by LBBS as lead counsel if Mr. Arnett and Carter Scholer are dismissed. Id.

13 Plaintiffs would not be burdened or prejudiced by LBBS's withdrawal. Given
 14 LBBS's limited involvement in the case to date and lack of knowledge of the
 15 evidence from the Texas Action, which is part and parcel of this action, it would be
 16 of little consequence to Plaintiffs if LBBS withdrew. Holden Decl., ¶¶6-8. In fact, it
 17 would likely cost roughly the same for substitute counsel to review and digest the
 18 extensive history of litigation in the Texas Action as it would for LBBS to do so. Id.,
 19 ¶7. LBBS cannot be substituted as lead counsel because Plaintiffs have not agreed
 20 to provide it with the substantial retainer LBBS demanded in order for it to serve in
 21 the lead counsel role. Id., ¶¶9-11, 13. This would result in an unreasonable financial
 22 burden on LBBS to take over as lead counsel without the appropriate agreement and
 23 retainer in place. Plaintiffs have refused to provide LBBS with a retainer that would
 24 enable LBBS to take on the lead counsel role, and LBBS is not in a position to
 25 continue without such a retainer. Holden Decl., ¶9. Rather than pay the retainer or
 26 search for alternate counsel, Plaintiffs continue to instead request that Mr. Arnett
 27 and Carter Scholer remain as lead counsel. Id., ¶10.

28 Plaintiffs will also not be burdened or prejudiced by the withdrawal of LBBS

1 and its attorneys because Mr. Gaubert and Friedman & Feiger, even if they have not
 2 entered appearances of record, remain interested in this action and involved in the
 3 trial of the Texas Action that substantially overlaps with this action. Holden Decl.,
 4 ¶11. Moreover, Plaintiffs have had ample notice of LBBS's intent to withdraw in
 5 the event Mr. Arnett and Carter Scholer withdraw as lead counsel and in the event
 6 that Plaintiffs did not pay the substantial retainer LBBS demanded in order to
 7 substitute LBBS as lead counsel. Holden Decl., ¶12. In fact, not long after LBBS
 8 became aware in March 2017 of Mr. Arnett's and Carter Scholer's intent to
 9 withdraw, LBBS instructed Plaintiffs to seek alternate lead counsel, even suggesting
 10 on multiple occasions that Friedman & Feiger would be (the most) appropriate for
 11 the lead counsel role given its knowledge of the relevant litigation history. Id.
 12 Plaintiffs have not obtained alternate counsel, and during a teleconference with
 13 Larry Friedman from Friedman & Feiger on March 31, 2017, Mr. Friedman refused
 14 to commit to taking over the lead counsel role in this action, despite his firms'
 15 involvement in the Texas Action and more extensive knowledge-base for the
 16 prosecution of this action. Id., ¶11. According to Mr. Arnett's declaration in support
 17 of his and Carter Scholer's motion to withdraw, Mr. Arnett also informed Plaintiffs
 18 many months ago about his and his firm's intent to withdraw as counsel and
 19 Plaintiffs' need to obtain new counsel. Id., ¶12. According to the declaration, Mr.
 20 Arnett had several conversations with Mr. Gaubert in February 2017 about who
 21 would be serving as substitute counsel, and the only response that was received was
 22 that various scenarios were being considered; no substitute counsel was identified.
 23 Id. Plaintiffs have been provided with more than ample opportunity to arrange for
 24 substitute counsel, in accordance with California Rules of Professional Conduct
 25 Rule 3-700(A)(2).

26 In Mr. Arnett's declaration in support of his and his firm's motion to
 27 withdraw, he states that Plaintiffs failed to pay their obligations. Holden Decl., ¶15.
 28 This is troubling to LBBS. Id. To the extent Plaintiffs have disregarded their

1 obligations to pay Mr. Arnett and Carter, LBBS is concerned Plaintiffs may also
 2 disregard its payment obligations to LBBS and therefore believe withdrawal is
 3 appropriate.

4 Plaintiffs alleged conduct, including its purported failure to timely pay its
 5 obligations, has resulted in a request by lead counsel to withdraw from this action,
 6 which has in turn rendered it unreasonably difficult for LBBS to serve in its local
 7 counsel role—the very limited position in which it was hired and agreed to serve.
 8 LBBS’s withdrawal is therefore appropriate.

9 Even if LBBS’s withdrawal delays the action, there exists good cause for the
 10 withdrawal and the ends of justice require it. Thus, withdrawal by LBBS is
 11 appropriate. Importantly, LBBS instructed Plaintiffs to find alternate counsel,
 12 including lead counsel, soon after learning of Mr. Arnett’s and Carter Scholer’s
 13 motion to withdraw. LBBS’s withdrawal should not cause delays, as LBBS point
 14 Plaintiffs on notice of its withdrawal as soon as practicable. Plaintiffs have also
 15 been purported advised by Mr. Arnett to look for substitute counsel for many
 16 months.

17 Plaintiffs will be better served by being represented by new counsel if Mr.
 18 Arnett and Carter Scholer are permitted to withdraw as lead counsel.

19 WHEREFORE, LBBS respectfully requests that this Court grant its motion
 20 and order that it be withdrawn as counsel for Plaintiffs and discharged from all
 21 further responsibility to Plaintiffs in this matter.

22 DATED: April 3, 2017

LEWIS BRISBOIS BISGAARD & SMITH LLP

23 By: /s/ Craig Holden

24 Craig Holden

25 Adrianna Kourafas

26 Attorneys for Plaintiffs EVOLV HEALTH,
 27 LLC and EVOLVHEALTH MEXICO
 28 SERVICIOS, S. de R.L. de C.V.

CERTIFICATE OF SERVICE

EVOLV HEALTH, LLC, et al. v. COSWAY USA, INC., et al.
United States District Court, Central District, Western Division
Case no. 2:16-cv-01602-ODW (ASx)

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to the action. My business address is 650 Town Center Drive, Suite 1400, Costa Mesa, CA 92626. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On April 3, 2017, I served the following document(s): **NOTICE OF MOTION AND MOTION TO WITHDRAW AS COUNSEL FOR PLAINTIFFS; MEMORANDUM OF POINTS AND AUTHORITIES**

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on April 3, 2017, at Costa Mesa, California.



Susan Song

SERVICE LIST

EVOLV HEALTH, LLC, et al. v. COSWAY USA, INC., et al.
United States District Court, Central District, Western Division
Case no. 2:16-cv-01602-ODW (ASx)

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